Supreme Court, U.S.
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No. 96-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DISCON INCORPORATED,

Cross-Petitioner,

vs.

NYNEX CORPORATION, NYNEX MATERIEL ENTERPRISES COMPANY, NEW YORK TELEPHONE COMPANY, ROBERT J. ECKENRODE, and BERNARD O'REILLY,

Cross-Respondents.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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May 5, 1997

18 pp

QUESTIONS PRESENTED

Where a claim under 18 U.S.C. § 1962(c) defines the "enterprise" as a holding company and all of its subsidiaries, as well as agents engaged by the companies:

1. Are individual officers and managers of the holding company or of its subsidiaries sufficiently distinct from the enterprise to be RICO defendants?

2. Are the holding company and two of the subsidiaries each sufficiently distinct from the enterprise to be RICO defendants?

PARTIES TO THE PROCEEDING

All parties to this proceeding appear in the caption of the decision of the United States Court of Appeals for the Second Circuit, which is contained in the Appendix to the opening petition at pages 1a to 20a.[1] References to the Appendix are hereafter referred to as "-a".

In accordance with Supreme Court Rule 29.6, petitioner, Discon, Inc., states that it has no corporate parent or subsidiary.

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[1] Cross-respondents Eckenrode and O'Reilly are not listed in the caption of the opening petition because the Court of Appeals affirmed the District Court's dismissal of the claims against them, and, accordingly, they did not seek this Court's review of the decision below.

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No. 96-____

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DISCON INCORPORATED,

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully requests this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, which affirmed the dismissal by the United States District Court for the Western District of New York of all the RICO claims in plaintiff's amended complaint.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 93 F.3d 1055, and is set forth in the Appendix at 1a-20a. The order of the Court of Appeals denying cross-respondents'

petition for rehearing and rehearing *in banc* is not reported and is set forth in the Appendix at 54a-55a. The opinion of the District Court is not reported and is set forth in the Appendix at 21a-53a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 26, 1996. Cross-respondents' petition for rehearing was denied by the Court of Appeals on January 7, 1997 (54a-55a). The opening petition was placed on the docket of this Court on April 4, 1997. This conditional cross-petition is filed pursuant to Rule 12.5 of the Rules of this Court. The jurisdiction of this Court to review the judgment of the Court of Appeals by writ of certiorari is conferred by 28 U.S.C. §1254(1).

STATUTES INVOLVED

18 U.S.C. § 1962(c) reads as follows:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(d) reads as follows:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

STATEMENT OF THE CASE

A. Background

This case arose out of the massive fraud that cross-respondents perpetrated on the ratepayers of NYNEX Corp.'s ("NYNEX") wholly owned subsidiary, cross-respondent New York Telephone Company ("NYTel") by having one of NYNEX's other wholly owned subsidiaries, cross-respondent Material Enterprises Company ("MECo"), buy goods and services that it resold to NYTel at padded prices as much as 600 percent higher than MECo's cost. NYTel then recovered its grossly inflated costs from its captive ratepayers. *See, In the Matter of New York Telephone Co.*, 5 FCC Rcd. 866, 869 (1988) ("NYNEX's corporate purchasing policy...effectively established the regulated telephone compan[y] as [a] captive customer...of MECo"); *In the Matter of New York Telephone Co.*, 5 FCC Rcd. 5892 (1990) (consent decree pursuant to which NYTel and New England Tel. Co. reduced their capital account balances (on which ratepayers were paying depreciation costs) by $32.6 million, reduced their interstate revenue requirements by $35.5 million and paid U.S. Treasury $709,500 each); *New York Telephone Co.*, 31 N.Y.P.S.C. 485, *aff'd*, 190 A.D. 2d 217, 597 N.Y.S.2d 760 (3d Dept. 1993) (disallowing $13.85 million from NYTel's intrastate rates and requiring $20 million yearly to be held subject to refund). As part and parcel of this scheme, MECo conspired with one of its only two suppliers of turnkey central telephone office removal services to exclude its other, lower cost supplier, cross-petitioner Discon, from the market.

B. The Complaint

Insofar as is relevant to this cross-petition, Discon's complaint alleged, *inter alia*, that in implementing the scheme described above, cross-respondents conducted the affairs of an enterprise through a widespread pattern of racketeering, committing numerous acts of mail fraud, wire fraud and extortion. The complaint (J.A. 152-153) and Discon's RICO Case Statement (J.A. 163-186) detailed which predicate acts were alleged to have been committed by each cross-respondent. The complaint defined the enterprise (for the section 1962(c) claim) as an association in fact comprised of NYNEX Corp., each of its subsidiaries, including MECo and NYTel, and agents engaged by NYNEX Corp. or by one or another of its subsidiaries (J.A. 152).

In addition to alleging that cross-respondent Eckenrode -- a NYNEX vice-president -- committed multiple predicate acts, the complaint alleged that he formulated the so-called "Eckenrode Synergy Plan," a plan designed to lead NYTel officials to join in the scheme to subsidize NYTel's unregulated affiliates at the expense of its ratepayers (J.A. 115-116). Cross-respondent O'Reilly -- a then MECo manager -- was alleged, *inter alia*, to have sought to extort from Discon affirmative misrepresentations to NYTel regarding the terms of Discon's contracts with MECo (J.A. 116).

The complaint also alleged that each of the cross-respondents conspired to conduct the affairs of the enterprise through a pattern of racketeering in violation of 18 U.S.C. § 1962(d) (J.A. 156).

C. The Opinion of the District Court

The District Court had jurisdiction over this case pursuant to 15 U.S.C. § 15 and 18 U.S.C. § 1964 (J.A. 114). Insofar as is relevant to this cross-petition, the District Court dismissed Discon's § 1962(c) claim, *inter alia*, for failure to plead fraud with sufficient particularity (42a-43a) and because three of the four alleged acts of extortion occurred more than four years before the complaint was filed. The District Court stated that "the purported Hobbs Act violations ... must be dismissed as time barred" (45a).

The District Court dismissed Discon's § 1962(d) claim because it had dismissed the § § 1962(b) and 1962(c) claims.

D. The Opinion of the Court of Appeals

Insofar as is relevant here, the Court of Appeals affirmed the District Court's dismissal of Discon's § 1962(c) and 1962(d) claims. While acknowledging that, as to the § 1962(c) claim, its decision was "by no means dictated by clear precedent" (18a), and that the situation presented by this case "lies somewhere between *Riverwoods* [*Chappaqua Corp.* v. *Marine Midland Bank*, 30 F.3d 339 (2d Cir. 1994)] and *Cullen* [v. *Margiotta*, 811 F.2d 698 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987)]," the court reasoned that here, as in *Riverwoods*, "the individual defendants were acting in the scope of a single corporate structure, guided by a single corporate consciousness[, and i]t would be inconsistent for a RICO person, acting in the scope of its authority, to be subject to liability simply because it is separately incorporated, whereas otherwise it would not be held liable under *Riverwoods*" (19a). Accordingly, the court

held that the persons who were defendants in this case were not sufficiently distinct from the enterprise that they were alleged to have operated through a pattern of racketeering, and, solely on this basis, affirmed the District Courts's dismissal of Discon's
§ 1962(c) claim.

The Court of Appeals then affirmed the District Court's dismissal of Discon's § 1962(d) claim on the exclusive ground that such a claim cannot stand absent a viable cause of action for a substantive violation of RICO (19a-20a).

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS SQUARELY CONFLICTS WITH MULTIPLE DECISIONS OF NINE OTHER CIRCUIT COURTS OF APPEAL ON AN IMPORTANT QUESTION OF LAW

The decision below, affirming the dismissal of the section 1962(c) claim as to individual cross-respondents Eckenrode and O'Reilly, on the ground that "they were guided by a single corporate consciousness" (19a), directly conflicts with multiple decisions of nine other Circuit Courts of Appeal, all of which have held that individual owners, officers, and employees of such enterprises as corporations, partnerships or unincorporated proprietorships are sufficiently distinct from those enterprises to be liable under § 1962(c) for conducting the affairs of those enterprises through a

pattern of racketeering.[2]

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[2] *See, Miranda* v. *Ponce Federal Bank*, 948 F.2d 41, 45 (1st Cir. 1991) (bank's officers distinct from bank); *Jaguar Cars, Inc.* v. *Royal Oaks Motor Car Co.*, 46 F.3d 258, 269 (3d Cir. 1995) (officers and employees of corporation distinct from corporation); *Landry* v. *Air Line Pilots Ass'n, AFL-CIO*, 901 F.2d 404, 434 (5th Cir.), *cert. denied*, 498 U.S. 895 (1990) (union representative distinct from association in fact that included union); *United States* v. *Cauble*, 706 F.2d 1322, 1340 (5th Cir. 83), *cert denied*, 465 U.S. 1005 (1984) (individual partner distinct from limited partnership); *Davis* v. *Mutual Life Insurance Co. of New York*, 6 F.3d 367, 377-78 (6th Cir. 1993), *cert. denied*, 510 U.S. 1193 (1994) (association of insurance company's agents distinct from company); *Fleischhauer* v. *Feltner*, 879 F.2d 1290, 1297 (6th Cir. 1989) (individual sole owner of three corporations distinct from association in fact including him, another individual and the corporations); *United States* v. *Robinson*, 8 F.3d 398, 406-07 (7th Cir. 1993) (officers of company distinct from company); *Ashland Oil, Inc.* v. *Arnett*, 875 F.2d 1271, 1280 (7th Cir. 1989) (sole owner of corporation distinct from corporation); *United States* v. *Horak*, 833 F.2d 1235 (7th Cir. 1987) (employee of wholly owned subsidiary distinct from parent company); *McCullough* v. *Suter*, 757 F.2d 142, 143 (7th Cir. 1985) (sole owner of unincorporated proprietorship distinct from proprietorship); *Bennett* v. *Berg*, 685 F.2d 1053, 1061 (8th Cir. 1982), *aff'd in banc*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 464 U.S. 1008 (1983) (founder of not-for-profit and not-for profits controlled by him distinct from association in fact including him and controlled not-for-profits); *Sever* v. *Alaska Pulp Corp.*, 978 F.2d 1529, 1534 (9th Cir. 1992) (officers and employees of corporation distinct from corporation); *United States* v. *Feldman*, 853 F.2d 648, 656 (9th Cir. 1988), *cert. denied*, 489 U.S. 1030 (1989) (individual distinct from several corporations he had formed); *United States* v. *Benny*, 786 F.2d 1410, 1415-16 (9th Cir.), *cert. denied*, 479 U.S. 1017 (1986); (operator of sole proprietorship consisting of four individuals using his name distinct from proprietorship); *Yellow Bus Lines, Inc.* v. *Local Union 639*, 913 F.2d 948, 951 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1080 (1991) (adopting panel opinion holding that defendant business agent of local was distinct from local); *United States* v. *Perholtz*, 842 F.2d 343, 353-54 (D.C. Cir.), *cert. denied*, 488 U.S. 821 (1988) (individual distinct from association in fact including him,

The rationale of these holdings is perhaps most clearly and cogently set out in *McCullough* v. *Suter*, 757 F.2d 142 (7th Cir. 1985), where the court, per Posner, J., explained that the distinction that section 1962(c) requires between the "person" who is a defendant and the "enterprise" that the defendant is alleged to have operated through a pattern of racketeering is satisfied where the defendant has employees or associates, whether the enterprise is formally different from the defendant, as where he has formed a corporation, or practically different, as where other individuals work in an unincorporated proprietorship. Thus Suter was a proper defendant because his sole proprietorship, which was the enterprise, employed several other individuals. Moreover, the *Suter* court reasoned, an individual would be a proper defendant where his solely owned corporation is the enterprise even where that corporation has no other employees, because the legal difference between an individual and his corporation gives the individual real protections, such as limited liability, which distinguishes the corporation from the individual. This reasoning was adopted by the Courts of Appeal for the Third and Ninth Circuits in *haec verba*:

> "The only important thing is that [the enterprise] be either formally (as when there is a corporation) or practically (as when there are other people beside the proprietor working in the organization) separable from the individual."

United States v. *Benny*, 786 F.2d 1410, 1416 (9th Cir.), *cert. denied*, 479 U.S. 1017 (1986) (quoting *McCollough* v. *Suter*, 757 F.2d 142, 144 (7th Cir. 1985); *Jaguar Cars, Inc.*

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other individuals and corporations).

v. *Royal Oaks Motor Car Co.*, 46 F.3d 258, 269 (3d Cir. 1995) (*same*).

The decision below ignored the differences, both formal and practical, between the individual cross-respondents and the enterprise alleged. That decision cannot be reconciled with the decisions cited above. In the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and D.C. Circuits, cross-respondents Eckenrode and O'Reilly, as individuals both formally and practically distinct from the corporations for which they worked and which were part of the alleged association in fact, would have been held subject to liability; here, they were not.

The Court of Appeals' affirmance of the dismissal of Discon's § 1962(c) claim against NYNEX, NYTel and MECo followed from its affirmance of the dismissal of the claim against the individual defendants. The court explained that:

> It would be inconsistent for a RICO person, acting within the scope of its authority, to be subject to liability simply because it is separately incorporated, whereas otherwise it would not be held liable under *Riverwoods*.

(19a).

Inasmuch as the Court of Appeals ignored the formal and practical separation of NYNEX, NYTel and MECo from each other and from the larger enterprise that included them as well as other NYNEX subsidiaries, the court's decision as to them conflicts with the decisions cited above. Moreover, as to MECo and NYTel, the decision squarely conflicts with the holding of the Court of Appeals for the Seventh Circuit

in *Haroco* v. *American National Bank & Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985), that a wholly owned subsidiary can be held liable for conducting the affairs of its parent corporation through a pattern of racketeering. *Haroco* at 402. If under the rule of *Haroco* a subsidiary is distinct from its parent company alone, it is, *a fortiori*, distinct from an association in fact, such as that alleged here, that is comprised of the parent company and other legal entities.

The decisions of the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and D.C. Circuits cited above present a better reasoned approach than that of the decision below. The bedrock purpose of RICO is to prevent the turning of legitimate businesses to criminal ends. It is precisely such a "turning" of the NYNEX enterprise that is alleged in this case. Those individuals and corporations alleged to have been instrumental in that turning should not be held immune to liability.

That the Court of Appeals held the separate incorporation of NYNEX, MECo and NYTel to be insignificant is especially egregious inasmuch as the separate corporate existence of NYTel, a regulated entity with specific legal obligations under New York Public Service Law, and MECo, an unregulated profit center, was the linchpin of cross-respondents' scheme to foist supra-market costs on NYTel and to have NYTel pass these inflated costs through to its captive ratepayers. That separation was the necessary precondition for the alleged pattern of racketeering through which the scheme was alleged to have been implemented. As the Court of Appeals for the Eighth Circuit explained in *United States* v. *Feldman*, 853 F.2d, *supra*:

> It was [the] very separate existence [of

> Feldman's corporations] that made Feldman's activities possible and profitable, and "it is just this sort of legal shield for illegal activity that RICO tries to pierce." *McCullough*, 757 F.2d at 144.

Feldman at 656.

CONCLUSION

For the foregoing reasons, if the opening petition is granted, the conditional cross-petition should also be granted.

Dated: May 5, 1997

Respectfully submitted,

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BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION

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June 13, 1997

Counter-Statement of Questions Presented

1. Is the requirement of separation of ''person'' and ''enterprise'' under Section 1962(c) of the RICO statute, 18 U.S.C. § 1962(c), satisfied where the ''enterprise'' is alleged to consist of a corporation and its subsidiaries and agents, and the ''persons'' named as defendants are the corporation, two of its subsidiaries, and two of their employees?

2. Did cross-petitioner succeed in alleging any predicate acts in violation of 18 U.S.C. § 1962(c)?

3. Was cross-petitioner injured in its business or property, within the meaning of 18 U.S.C. § 1964(c), by reason of any alleged violation of 18 U.S.C. § 1962(c)?

Statement Pursuant to Supreme Court Rule 29.6

Pursuant to Supreme Court Rule 29.6, the corporate cross-respondents state that cross-respondent NYNEX Corporation has no parent company, and that it is the direct or indirect parent company of cross-respondents New York Telephone Company and NYNEX Materiel Enterprises Company. New York Telephone Company and NYNEX Materiel Enterprises Company have no nonwholly owned subsidiaries. The nonwholly owned entities in which NYNEX Corporation has direct and indirect interests are listed on pages ii-iii of the initial Petition for a Writ of Certiorari in this case, No. 96-1570.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DISCON INCORPORATED,

Cross-Petitioner,

v.

NYNEX CORPORATION, NYNEX MATERIEL ENTERPRISES COMPANY, NEW YORK TELEPHONE COMPANY, ROBERT J. ECKENRODE, and BERNARD O'REILLY,

Cross-Respondents.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION

Discon Incorporated ("Discon"), the respondent in No. 96-1570, has filed a conditional cross-petition for certiorari. For the reasons summarized below, Discon's conditional cross-petition should be denied.

The issues raised in Discon's conditional cross-petition have no relationship to the issues raised in the initial petition for certiorari in this case. The initial petition for certiorari challenges the unprecedented theories adopted by the court below under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, which are in direct conflict with holdings of this Court and numerous Courts of Appeals. The cross-petition questions the lower court's application of Section 1962(c) of the RICO statute, 18 U.S.C. § 1962(c). As shown below, the

lower court's application of Section 1962(c) was correct, and is supported by the weight of relevant authority in the Courts of Appeals, which Discon fails to cite in its cross-petition. In addition, Discon's Section 1962(c) claim was properly dismissed because it failed to allege the required predicate acts and injury to its business or property by reason of a violation of Section 1962(c).

Statutes Involved

Section 1962(c) of the RICO statute, 18 U.S.C. § 1962(c), reads as follows:

> "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

Section 1964(c) of the RICO statute, 18 U.S.C. § 1964(c), reads in pertinent part as follows:

> "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . ."

Counter-Statement of the Case

A. Discon's Section 1962(c) Claim

Discon's initial complaint alleged violations of all four subsections of the RICO statute, 18 U.S.C. § 1962(a), (b), (c), and (d) (JA52-JA55[1]). The District Court dismissed these claims on numerous grounds, but granted leave to replead (JA70-JA71, JA86-JA97, JA108).

Discon's amended complaint did not include the claim under 18 U.S.C. § 1962(a), but sought to replead the claims under 18 U.S.C. § 1962(b), (c), and (d) (JA152-JA157). Discon's Section 1962(c) claim alleged that the "enterprise" consisted of NYNEX Corporation ("NYNEX") and its subsidiaries, as well as "attorneys, accountants and other agents" (JA152). It alleged that the defendant "persons" who supposedly conducted and participated in the affairs of the enterprise through a pattern of racketeering activity were NYNEX, two of its subsidiaries (NYNEX Materiel Enterprises Company ("MECo") and New York Telephone Company ("NYT")), and two of their employees (Robert J. Eckenrode and Bernard O'Reilly) (*id.*).

Discon alleged a pervasive pattern of racketeering activity on the part of NYNEX and its subsidiaries and their employees (JA152-JA153). It alleged that a key part of this pattern of racketeering activity consisted of excessive payments by NYT to other NYNEX companies, which were alleged to be part of a scheme to defraud regulatory commissions and ratepayers (JA113, JA132-JA139). Despite this allegation of fraud on regulatory commissions, Discon's amended complaint admitted that regulatory commissions

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1. "JA" citations are to the Joint Appendix in the Court of Appeals.

were aware that NYT's payments to other NYNEX companies included markups, and actively investigated those payments.[2] Discon's amended complaint also alleged a variety of other RICO predicate acts, including obstruction of justice and extortion (JA113, JA139-JA147).

B. The Decision of the District Court

The District Court dismissed the RICO claims in Discon's amended complaint on multiple and independently sufficient grounds (Pet. 38a-49a).

First, the District Court held that Discon had failed to allege RICO predicate acts that injured it in its business or property (Pet. 40a-46a). In particular, the District Court held that Discon had failed to plead the alleged fraud-based predicate acts with the particularity required by Federal Rule of Civil Procedure 9(b), and had failed to allege any fraud directed at Discon (Pet. 40a-44a). The District Court also held that Discon had failed to plead predicate acts of extortion and obstruction of justice (Pet. 45a-46a).

Second, the District Court held that Discon had failed to satisfy the specific requirements of the RICO subsections it relied upon (Pet. 47a-49a). With respect to Section 1962(c), the District Court held that Discon had failed to allege an "enterprise" that was distinct from the "persons" named as defendants, as required by Section 1962(c) (Pet. 48a-49a).

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2. The Federal Communications Commission ("FCC") began an investigation in mid-1988 which led in February 1990 to the FCC order to show cause which is referred to in the amended complaint (*see* JA120-JA121) and in the cross-petition (*see* Cr.-Pet. 3). The New York State Public Service Commission ("NYPSC") conducted an audit, referred to in the amended complaint (*see* JA130), which led to a November 1987 report recommending that MECo's prices to NYT be adjusted to reflect a rate of return for MECo that would be no higher than that authorized for NYT.

C. The Decision of the Court of Appeals

The Court of Appeals held that the District Court had properly dismissed Discon's RICO claims for failure to satisfy the specific requirements of 18 U.S.C. § 1962(b), (c), and (d) (Pet. 15a-20a).

With respect to Section 1962(c), the Court of Appeals noted (Pet. 17a) that it had previously held that Section 1962(c) clearly requires that the "person" and the "enterprise" be distinct, *Bennett* v. *United States Trust Co.*, 770 F.2d 308, 315 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986), and that this requirement cannot be circumvented "by alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant . . . ." *Riverwoods Chappaqua Corp.* v. *Marine Midland Bank*, 30 F.3d 339, 344 (2d Cir. 1994).

The Court of Appeals held in the present case that the requirement of a distinction between the "person" and the "enterprise" under Section 1962(c) of the RICO statute likewise cannot be circumvented by alleging an enterprise consisting of the defendant corporation and its wholly-owned subsidiaries (Pet. 18a-19a).

REASONS FOR DENYING THE WRIT

I. The Court of Appeals Correctly Held That the Requirement of a Distinction Between the "Person" and the "Enterprise" Under Section 1962(c) of the RICO Statute Is Not Satisfied Where the "Person" and the "Enterprise" Both Consist of a Corporation and Subsidiaries and Employees of the Corporation

Section 1962(c) of the RICO statute (quoted on page 2 above) draws a clear distinction between the defendant "person" and the "enterprise." As a result, "[v]irtually all courts of appeals considering the question hold that, as a matter of law, the same person may not be both a section 1962(c) enterprise and a defendant." Douglas E. Abrams, *The Law of Civil RICO* § 4.7.1, at 223 (1991) (footnote omitted).[3] Thus, for example, a corporation such as NYNEX cannot be both the "person" and the "enterprise" under Section 1962(c).

In its Section 1962(c) claim, Discon sought to avoid this requirement by defining the "enterprise" as including NYNEX and its subsidiaries, and by naming as the defendant

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3. *See, e.g.*, *Bennett* v. *United States Trust Co.*, 770 F.2d 308, 315 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986); *Atkinson* v. *Anadarko Bank & Trust Co.*, 808 F.2d 438, 439 (5th Cir.), *cert. denied*, 483 U.S. 1032 (1987); *Haroco, Inc.* v. *American Nat'l Bank & Trust Co.*, 747 F.2d 384, 399-402 (7th Cir. 1984), *aff'd per curiam on other grounds*, 473 U.S. 606 (1985); *Bennett* v. *Berg*, 685 F.2d 1053, 1061-62 (8th Cir. 1982), *aff'd in part, rev'd in part on other grounds en banc*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 464 U.S. 1008 (1983).

The only Court of Appeals that has held to the contrary appears to be the Eleventh Circuit. *See, e.g.*, *United States* v. *Hartley*, 678 F.2d 961, 986-90 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170, 1183 (1983).

"persons" NYNEX, two of its subsidiaries, and two of their employees (JA152). The court below held that this did not supply the required distinction between the "person" and the "enterprise," because a corporation such as NYNEX necessarily carries on its activities through subsidiaries and employees (Pet. 17a-19a).

Discon's cross-petition argues that this holding was in conflict with the decisions of nine other Circuits (Cr.-Pet. 6-8 & n.2). In actuality, the holding of the court below is consistent with the weight of authority in the Circuits that have addressed this issue.[4] The cases cited by Discon either did not

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4. *See, e.g.*, *Compagnie de Reassurance d'Ile de France* v. *New England Reinsurance Corp.*, 57 F.3d 56, 92 (1st Cir.) (wholly-owned subsidiary not distinct from alleged parent-enterprise), *cert. denied*, 116 S. Ct. 564 (1995); *Odishelidze* v. *Aetna Life & Cas. Co.*, 853 F.2d 21, 23 (1st Cir. 1988) ("the Aetna companies and their officers or employees (the named defendants) cannot be the entity that conducts its own affairs through a pattern of racketeering activity"); *NCNB Nat'l Bank* v. *Tiller*, 814 F.2d 931, 936 (4th Cir. 1987) (bank subsidiary not distinct from alleged holding company-enterprise); *United States* v. *Computer Sciences Corp.*, 689 F.2d 1181, 1190-91 (4th Cir. 1982) (en banc) (division not distinct from alleged corporation-enterprise), *cert. denied*, 459 U.S. 1105 (1983); *Parker & Parsley Petroleum Co.* v. *Dresser Indus.*, 972 F.2d 580, 583-84 (5th Cir. 1992) (RICO enterprise may not consist of "the defendant corporate entity functioning through its employees in the course of their employment"); *Old Time Enters., Inc.* v. *International Coffee Corp.*, 862 F.2d 1213, 1217-18 (5th Cir. 1989) ("Nor does the fact that individual officers and employees of a corporation, in the course of their employment associate together and commit in the conduct of the corporation's business a pattern of predicate acts in its name and on its behalf, suffice to constitute such officers and employees (alone or together with the corporation itself) an association in fact enterprise distinct from the corporation."); *Atkinson* v. *Anadarko Bank & Trust Co.*, 808 F.2d 438, 440-41 (5th Cir.) (alleged association of bank, its holding company, and three employees not distinct from bank), *cert. denied*, 483 U.S. 1032 (1987); *Puckett* v. *Tennessee Eastman Co.*, 889 F.2d 1481, 1489 (6th Cir. 1989) (plaintiff's claim "contemplated only one entity, the corporation, acting in the only manner it is

involve the issue presented here, which is whether the "person" and the "enterprise" are distinct when both of them include a corporation and subsidiaries and employees carrying on the activities of the corporation,[5] or did not squarely address the reasoning of the cases cited in footnote 4 above.[6]

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possible for a corporation to act, through its employees"); *Richmond* v. *Nationwide Cassel L.P.*, 52 F.3d 640, 647 (7th Cir. 1995) (plaintiff cannot "circumvent the distinctiveness requirement by alleging enterprises that are merely combinations of individuals or entities affiliated with a defendant corporation"); *Board of County Comm'rs of San Juan County* v. *Liberty Group*, 965 F.2d 879, 886 (10th Cir.) ("the officers and employees of an organization cannot, in the ordinary course of their duties, constitute an association in fact separate from the organization itself"), *cert. denied*, 506 U.S. 918 (1992).

5. Most of the cases cited by Discon did not involve an "enterprise" and "persons" both of which consist of a corporation and subsidiaries and employees of the corporation (*see* Cr.-Pet. 7-8 n.2).

6. The Third Circuit has rendered inconsistent decisions, first holding that employees and affiliates of a corporation are not distinct from the corporation for purposes of Section 1962(c), *see, e.g.*, *Brittingham* v. *Mobil Oil Corp.*, 943 F.2d 297, 300-03 (3d Cir. 1991), and then holding that employees may be distinguished from the corporation. *See Jaguar Cars, Inc.* v. *Royal Oaks Motor Car Co.*, 46 F.3d 258, 268-69 (3d Cir. 1995), cited by Discon (Cr.-Pet. 7 n.2). Even after *Jaguar Cars*, the Third Circuit affirmed a holding that a corporation is not distinct from an "enterprise" including its subsidiaries and affiliates. *See Metcalf* v. *PaineWebber Inc.*, 886 F. Supp. 503, 512-15 (W.D. Pa. 1995), *aff'd without opinion*, 79 F.3d 1138 (3d Cir. 1996).

The Third Circuit panel in *Jaguar Cars* suggested that its holding was required by *Reves* v. *Ernst & Young*, 507 U.S. 170 (1993). *See* 46 F.3d at 268-69. This suggestion was erroneous. In *Reves*, this Court held that, to be liable under RICO Section 1962(c), a defendant "person" must participate in the operation or management of the "enterprise." *See* 507 U.S. at 177-86. *Reves* did not address the contours of the required distinction between the "person" and the "enterprise," and did not suggest that a Section 1962(c) claim can be sustained where both the "person" and the "enterprise" include a corporation and subsidiaries and employees of the corporation.

The holding of the court below on the issue presented in this case was clearly correct. If Discon's argument were valid, then all a plaintiff would need to do in order to circumvent the distinctiveness requirement of Section 1962(c) in any claim against a corporation would be to name as a defendant at least one employee or subsidiary of the defendant corporation. This would reduce the distinctiveness requirement to a dead letter in any case involving a corporation.

Discon argues that the holding of the court below undermines "[t]he bedrock purpose of RICO . . . to prevent the turning of legitimate businesses to criminal ends" (Cr.-Pet. 10). This argument proves far too much. If it had been the purpose of Congress to make available a treble damage remedy for any alleged federal or state crime, it would have been a simple matter to draft a statute saying just that. Congress did not do so. Instead, it provided a treble damage remedy under RICO only where the requirements of one of the subsections of Section 1962 of the RICO statute are met. In the case of Section 1962(c), one of the most important of these requirements is the distinctiveness requirement. The court below correctly enforced the distinctiveness requirement in this case.

II. As the District Court Properly Held, Discon's Section 1962(c) Claim Is Also Subject to Dismissal for Additional and Independent Reasons

The issue which Discon seeks to tender to this Court in its cross-petition is not determinative of the fate of its Section 1962(c) claim. As the District Court held, Discon's Section 1962(c) claim is independently subject to dismissal because Discon failed to allege RICO predicate acts, and because it failed to allege injury to its business or property by reason of

any such acts (Pet. 40a-46a).[7]

A. Discon Failed to Allege Any RICO Predicate Acts

In order to state a claim for damages based on an alleged violation of Section 1962(c), a plaintiff must allege that it has been injured in its business or property by reason of RICO predicate acts. *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 496 (1985). The District Court correctly held that plaintiff had failed to meet this requirement (Pet. 40a-46a).

Discon relied principally upon alleged predicate acts of mail fraud, wire fraud, and securities fraud (JA113, JA132-JA139, JA142-JA144). The District Court held that Discon had failed to state "the circumstances constituting fraud . . . with particularity," as required by Federal Rule of Civil Procedure 9(b) (Pet. 40a-44a). This holding was clearly correct. To comply with Rule 9(b), a complaint alleging fraud must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent."[8] The District Court held, after a careful review of Discon's "confusing and lengthy" amended complaint (Pet. 50a), that Discon's allegations failed to satisfy this standard (Pet. 42a-44a).[9]

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7. Because the Court of Appeals held that Discon had failed to satisfy the specific requirements of Section 1962(b), (c), and (d), it did not reach these alternative grounds for dismissal (*see* Pet. 15a-20a).

8. *Shields* v. *Citytrust Bancorp., Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994), *quoting Mills* v. *Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993), *citing Cosmas* v. *Hassett*, 886 F.2d 8, 11 (2d Cir. 1989).

9. The defectiveness of Discon's fraud allegations was particularly obvious in light of the admitted fact that the regulatory commissions, which were allegedly defrauded, were aware of MECo's markups and were actively investigating them (*see* pp. 3-4 & n.2 *supra*).

The District Court also held that Discon had failed to allege predicate acts of extortion and obstruction of justice (Pet. 44a-46a). Again, these holdings were correct.

B. Discon Failed to Allege Injury to Its Business or Property by Reason of Any RICO Predicate Acts

Section 1964(c) of the RICO statute provides that, in order to recover treble damages, a plaintiff must be "injured in his business or property by reason of a violation of" Section 1962. Section 1964(c) requires that the injury to business or property be the direct and proximate result of the RICO violation. *Holmes* v. *SIPC*, 503 U.S. 258, 265-70 (1992).

Discon claimed that it was injured in its business or property by the alleged fraud in its capacity as a telephone ratepayer, but the District Court correctly held that this claim was barred by the filed rate doctrine, since the telephone rates paid by Discon were regulated by federal and state regulatory commissions (Pet. 46a).[10] Discon also alleged that the NYNEX companies stopped dealing with it so that they could maximize their profits from the alleged fraud, but such an indirect and speculative chain of causation running from the alleged fraud to the alleged injury does not satisfy the requirements of Section 1964(c) of the RICO statute (*see* Pet. 44a).[11]

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10. *See, e.g., Sun City Taxpayers' Ass'n* v. *Citizens Utils. Co.*, 45 F.3d 58, 61-62 (2d Cir.), *cert. denied*, 115 S. Ct. 1693 (1995); *Wegoland Ltd.* v. *NYNEX Corp.*, 27 F.3d 17, 19-22 (2d Cir. 1994); *Taffet* v. *Southern Co.*, 967 F.2d 1483, 1488-95 (11th Cir.) (en banc), *cert. denied*, 506 U.S. 1021 (1992); *H.J., Inc.* v. *Northwestern Bell Tel. Co.*, 954 F.2d 485, 488-94 (8th Cir.), *cert. denied*, 504 U.S. 957 (1992).

11. Thus, for example, former employees who allege that they have been terminated for reporting or refusing to participate in a pattern of racketeering activity lack standing to assert a RICO claim. *See, e.g., Bowman* v. *Western Auto Supply Co.*, 985 F.2d 383, 385-86 (8th Cir.), *cert. denied*, 508 U.S. 957 (1993); *Willis* v. *Lipton*, 947 F.2d 998,

Similarly, Discon failed to allege that it was injured in its business or property by reason of the alleged predicate acts of extortion and obstruction of justice (*see* Pet. 44a-46a).

Thus the dismissal of Discon's claim under Section 1962(c) of the RICO statute was proper, and should be affirmed, regardless of the issue which Discon seeks to present to this Court in its conditional cross-petition for certiorari.

1000-01 (1st Cir. 1991); *Reddy* v. *Litton Indus., Inc.*, 912 F.2d 291, 294 (9th Cir. 1990), *cert. denied*, 502 U.S. 921 (1991); *Kramer* v. *Bachan Aerospace Corp.*, 912 F.2d 151, 154-56 (6th Cir. 1990); *Hecht* v. *Commerce Clearing House, Inc.*, 897 F.2d 21, 24 (2d Cir. 1990); *Burdick* v. *American Express Co.*, 865 F.2d 527, 529-30 (2d Cir. 1989).

Similarly, as the District Court held (Pet. 44a), a fraud-based RICO claim can be maintained only by the direct targets of the alleged fraud. *See, e.g., Israel Travel Advisory Serv., Inc.* v. *Israel Identity Tours, Inc.*, 61 F.3d 1250, 1257-58 (7th Cir.), *cert. denied*, 116 S. Ct. 1847 (1995); *Central Distribs. of Beer, Inc.* v. *Conn*, 5 F.3d 181, 184 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 2678 (1994).

CONCLUSION

For the reasons set forth above, cross-petitioner's conditional petition for a writ of certiorari should be denied.

Dated: June 13, 1997

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1996

DISCON INCORPORATED,

Cross-Petitioner,

vs.

NYNEX CORPORATION, NYNEX MATERIEL ENTERPRISES COMPANY, NEW YORK TELEPHONE COMPANY, ROBERT J. ECKENRODE and BERNARD J. O'REILLY,

Cross-Respondents.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION OF CROSS-RESPONDENT BERNARD J. O'REILLY

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Where a Plaintiff asserts a claim under 18 U.S.C. § 1962(c), against a holding company, its subsidiaries and employees alleging racketeering activity arising out of the normal operations of the business:

1. Should the Circuit Court's affirmance of the dismissal of civil RICO claims be sustained, given that Plaintiff's theory of civil liability under RICO as to the non-Petitioner individual Respondent, was based on the interaction between the individual, his employer and related corporations, and given the absence of any alleged predicate acts beyond the corporations' business.

2. Should a Plaintiff's Conditional Cross-Petition for certiorari as to civil RICO claims against a non-Petitioner individual Defendant be granted, notwithstanding that the Circuit Court has remanded in part Plaintiff's antitrust claims against Defendant-Petitioners for trial, and notwithstanding that Plaintiff's RICO claims arise from the same alleged facts.

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COUNTERSTATEMENT OF THE CASE

Cross-Respondent Bernard O'Reilly ("O'Reilly"), joined as an individual civil RICO Defendant before the Unites States District Court, and joined as an appellee before the United States Court of Appeals for the Second Circuit, but not appearing before the court as a Petitioner, respectfully submits this brief in opposition to the Conditional Cross-Petition of Certiorari.

A. Background

Cross-Petitioner Discon Corporation ("Discon") seeks this Court's review of a judgment of the United States Court of Appeals for the Second Circuit. The Court of Appeals affirmed in part and reversed in part a judgment of the United States District Court for the Western District of New York dismissing with prejudice Discon's complaint, alleging both civil RICO and antitrust violations, against Petitioners NYNEX Corporation ("NYNEX"), NYNEX Materiel Enterprises Company ("MECo") and New York Telephone Company ("NYT") (collectively the "NYNEX Defendants"). Cross-Respondent Bernard O'Reilly ("O'Reilly") and Robert J. Eckenrode ("Eckenrode") were also named as Defendants in the proceedings below. The Court of Appeals also affirmed the District Court's dismissal with prejudice of Discon's claims against these Defendants.

Discon was in the business of supplying equipment removal services. NYNEX is the parent company of NYT and MECo, among numerous other subsidiaries. MECo acted as a purchasing agent for the NYNEX group of companies. As such, MECo was often involved in procuring equipment removal services for NYT. NYT obtained these services either directly or through MECo. Discon was among the suppliers providing these services to NYT during the mid-1980's.

In 1985 and 1986, both MECo and NYT stopped using Discon's removal services. Instead, they transferred their business to AT&T Technologies, another company which performed removal services for the NYNEX companies. Discon basically alleged that the NYNEX Defendants schemed to inflict higher telephone rates on NYT customers by purchasing removal services from AT&T Technologies at inflated costs. Discon claims that this alleged arrangement was intended to drive Discon, an alleged competitor for the services at issue, out of the market. AT&T Technologies is not a party to this litigation. O'Reilly, an employee of MECo, was joined as a civil RICO defendant with his employer MECo and MECo's parent, NYNEX, essentially on the basis of allegations that O'Reilly participated as a MECo employee in the transactions complained of by Discon.

In its complaint, Discon alleged thirteen causes of action under both federal and state law. Discon's federal claims fell into two categories: (1) alleged violations of the Sherman Act (specifically 15 U.S.C. §§ 1 and 2); and (2) alleged violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") (specifically 18 U.S.C. § 1962(b) (c) and (d)). Discon's antitrust claims were not addressed to Defendant O'Reilly.

Discon's RICO arguments can be summarized as follows:

> 1. That NYNEX, MECo and Eckenrode maintained an interest in and control of NYT through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962 (b);[1]

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1. Discon has apparently abandoned this claim, since the ruling of the Court of Appeals on this issue is not addressed in Discon's Conditional Cross-Petition.

> 2. That NYNEX, MECo, NYT, Eckenrode and O'Reilly conducted and participated in NYNEX's affairs through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c); and,
>
> 3. That the Defendants conspired and agreed to commit violations of 18 U.S.C. § 1962(b) and (c), in violation of 18 U.S.C. (d).

Discon alleges that O'Reilly engaged in racketeering by *inter alia*, "[seeking] to extort from Discon affirmative misrepresentations" from Discon in furtherance of the alleged racketeering enterprise.

B. The Decision of the District Court

The District Court dismissed Discon's complaint in its entirety, without prejudice, on June 23, 1992. (JA67-JA108).[2] Discon subsequently filed an amended complaint which essentially rehashed the allegations of its initial complaint.

The Defendants moved to dismiss the amended complaint with prejudice pursuant to Fed. Rule Civ. Procedure 12(b)(6).[3] By Order dated June 7, 1995, the District Court granted Defendants' motion and dismissed all of Discon's federal claims,

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2. References to "JA" are to the Joint Appendix filed by the parties in connection with the proceedings before the Second Circuit.

3. In the proceedings below, all Defendants were represented by the law firms of Davis, Polk & Wardwell and Phillips, Lytle, Hitchcock, Blaine & Huber as co-counsel. As the Petition notes (p. ii), O'Reilly is not a Petitioner before this Court. Cross-Respondent O'Reilly retained separate counsel to represent him before this Court, following the filing of the Conditional Cross-Petition.

with prejudice. (52a-53a). The District Court did not retain jurisdiction over Discon's state law claims, and accordingly dismissed those claims without prejudice pursuant to Fed. R. Civ. Proc. 12(b)(1).[4] *Id.* The District Court stated the reasons for its decision in an unpublished opinion. (21a-53a).

1. The District Court's Dismissal of Plaintiff's Sherman Act Claims

The District Court relied on three grounds in dismissing Discon's claims under § 1 of the Sherman Act. First, the District Court held that a purchaser's decision to purchase from one supplier over another does not necessarily amount to an illegal conspiracy in restraint of trade. (*See* 29a, quoting *Nifty Foods Corp. v. Great Atl. & Pac. Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1980)). Second, the District Court held that Discon's § 1 "horizontal conspiracy" claims were fatally flawed since the NYNEX Defendants were purchasers of the removal services offered by Discon and AT&T Technologies, another provider of removal services, and were thus not themselves competing in that market. (28a-29a). Third, the District Court held that Discon's failure to allege a conspiracy among the Defendants to force sellers to comply with fixed prices also necessitated dismissal of the § 1 claim.

As to Discon's claims under § 2 of the Sherman Act, the District Court held that, since the NYNEX companies were not competitors of Discon in the removal services market, they could not have attempted to monopolize that market in violation of § 2.

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4. Discon has apparently since filed state court litigation against the NYNEX Defendants on these claims. Defendant O'Reilly is not a party to that case.

2. The District Court's Dismissal of Plaintiff's RICO Claims

In addition to dismissing Discon's antitrust claims, the District Court held that the Amended Complaint failed to plead fraud with particularity in support of its allegations of mail fraud, wire fraud and fraud in the sale of securities. (39a). The District Court also dismissed Discon's claim under 18 U.S.C. § 1962(b), holding that there was no evidence that NYNEX, MECo or Eckenrode acquired or maintained an interest in the alleged "enterprise" through a pattern of racketeering activity. (47a-48a).

The District Court also rejected Discon's contention that Eckenrode and O'Reilly "conducted and participated" in NYNEX's affairs through a pattern of racketeering activity. (48a-49a). In support of this ruling, the District Court relied on the common-sense based rule enunciated by the Second Circuit in *Riverwoods Chappaqua Corp. v. Marine Midland Bank*, 30 F.3d 339 (2d Cir. 1994). In *Riverwoods*, the Second Circuit held that RICO plaintiffs cannot circumvent the statutory requirement that the "persons" involved in a RICO action be separate from the alleged illegal "enterprise" simply "by alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying out the regular affairs of the Defendant." (48a-49a).

Finally, having rejected Discon's claims under subsections (b) and (c), the District Court held that the Defendants could not have unlawfully conspired to commit violations of those subsections. (49a). Accordingly, the District Court also dismissed Discon's claims under 18 U.S.C. § 1962(d).

C. The Decision of the Court of Appeals

Defendants appealed the dismissal of its federal claims to the Second Circuit Court of Appeals. The Court of Appeals affirmed the portion of the District Court's order dismissing all of Discon's RICO claims, including those against Cross-Respondent O'Reilly, substantially for the reasons expressed by the District Court.[5] However, the Court of Appeals held that the District Court improperly dismissed two of Discon's antitrust claims. (10a-11a, 14a-15a). Accordingly, the Second Circuit reversed the District Court's judgment as to those narrow issues and remanded the matter for further proceedings. (20a).

In affirming the dismissal of Discon's RICO claims, the Second Circuit also applied the common-sense based rule that an "enterprise" and a "person" must be distinct for purposes of subsection 1962(c). *See Bennett v. United States Trust Co.*, 770 F.2d 308, 315 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986). Specifically, the Court held that

> "a corporate entity may not be simultaneously the 'enterprise' and the 'person' who conducts the affairs of the enterprise through a pattern of racketeering activity." . . . In *Riverwoods Chappaqua Corp. v. Marine Midland Bank*, 30 F.3d 339 (2d Cir. 1994) we explained further that the distinctiveness requirement of *Bennett*, may not be circumvented by alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying out the regular affairs of the Defendant.

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5. The Second Circuit opinion is published at 93 F.3d 1055 (2d. Cir. 1996). It is also attached as an appendix to the NYNEX Defendants' Petition for Certiorari from the Second Circuit's remand of certain antitrust issues.

(*See* 16a-17a). (Citation omitted). The Second Circuit also upheld the District Court ruling that, in light of the dismissal of Discon's claims under subsections (b) and (c), Discon could not sustain its claims pursuant to subsection (d). (19a-20a).

The NYNEX Defendants filed a motion for reconsideration of the Second Circuit's holding to the extent that it reversed the District Court's decision dismissing the antitrust claims in their entirety. That motion was denied on or about January 7, 1997. (54a-55a). The NYNEX Defendants then petitioned this Court for Certiorari on or about April 3, 1997. Discon's Conditional Cross-Petition for Certiorari was docketed by this Court on May 16, 1997.

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION

There are several compelling reasons why this Court should not review the Second Circuit's holdings on the issues Discon raises in its Conditional Cross-Petition. Accordingly, even in the event the Court grants the NYNEX Defendants' Petition for Certiorari, Discon's Conditional Cross-Petition should be denied, at least as to Cross-Respondent O'Reilly. As indicated in more detail below, substantive law and procedural concerns make granting certiorari to Discon inappropriate.

I.

AS A NON-PETITIONER, CROSS RESPONDENT O'REILLY IS NOT SUBJECT TO A CONDITIONAL CROSS-PETITION FOR CERTIORARI DOCKETED BEYOND THE TIME HE WOULD BE SUBJECT TO A PETITION FOR CERTIORARI OR A NON-CONDITIONAL CROSS-PETITION FOR CERTIORARI.

As preliminary matter, it is respectfully submitted that O'Reilly is not properly included within the relief requested by the Plaintiff's Conditional Cross-Petition.

O'Reilly was not a Defendant within Discon's antitrust claims. However, since he was named as a civil RICO Defendant with his employer MECo, a common defense was provided for O'Reilly by MECo against Discon's civil RICO claims before the District Court. Similarly, MECo caused a response to Discon's appeal from the dismissal of the civil RICO claims to be jointly filed on behalf of O'Reilly and MECo.

The Second Circuit's affirmance on August 26, 1996 of the dismissal of the RICO claims ended O'Reilly's interest as a party Defendant in the matter. O'Reilly, of course, did not participate in the petition by the NYNEX Defendants for a rehearing on the Second Circuit's reversal the District Court order dismissing two of Discon's antitrust claims, because he was not an antitrust Defendant.

Similarly, because he had no interest, or party standing, on the antitrust issues, O'Reilly did not participate before this Court among the Petitioners seeking a writ of certiorari regarding the antitrust remand issues. The time for seeking further review of the dismissal of O'Reilly as a RICO defendant has otherwise elapsed due to Discon's failure to seek review of the Second Circuit's August 26, 1996 opinion by filing a timely petition to

the Court of Appeals for rehearing, Petition for a Writ of Certiorari, or a timely petition for a writ of certiorari under Rule 13.4.

Under Rule 12.5 a Petitioner, and all others deemed interested and "remaining" parties under Rule 12.6, are fairly put to the jeopardy that the Court may also grant certiorari of a Respondent's issue under a Conditional Cross-Petition, even though the Respondent has let the time for petition or (unconditional) Cross-Petition lapse. In this case, Petitioner was plainly noticed that O'Reilly was neither a Petitioner nor a remaining interested party in accordance with Rule 12.6 (*see* Petition at ii).

It is therefore respectfully submitted that Discon, as Conditional Cross-Petitioner, cannot seek further review as to any claims against non-Petitioner, non-party O'Reilly. Accordingly, the Conditional Cross-Petition should be denied as to O'Reilly, regardless of the disposition as to the other Cross-Respondents.

Given the conditional nature of the cross-petition, it would be remiss not to also note another, more general procedural reasons for declining further review of the order remanding this matter. Non-Petitioner and Cross-Respondent O'Reilly respectfully submits that the record of this matter is based on what were essentially pleading motions before the trial court, and this record is, of course, distinctly ill-suited to for resolution of any issues arising out of the complex fields addressed by both the Petitioners and Conditional Cross-Petitioners. *Cf. Socialist Labor Party v. Gilligan*, 406 U.S. 583, 587-588 (1972).

II.

TO THE EXTENT A CONFLICT EXISTS AMONG THE CIRCUIT COURTS OF APPEALS ON THE RICO ISSUES, THIS IS AN INAPPROPRIATE CASE BY WHICH TO RESOLVE THE CONFLICT BECAUSE THE DISMISSAL AS TO DEFENDANT O'REILLY IS SUSTAINABLE UNDER EVEN THE MOST EXPANSIVE FORMULATION OF RICO LIABILITY.

The Second Circuit properly affirmed the District Court's dismissal of Discon's RICO claims against Defendant O'Reilly. As indicated above, the Second Circuit based its holding on the settled principle that RICO "persons" must be sufficiently distinct from the "enterprise" they allegedly maintain in violation of the statute. (18a-19a). This holding is in accord with prior Second Circuit law as enunciated in *Riverwoods Chappaqua supra* and *Bennett, supra*. Based on these prior holdings, the Second Circuit concluded that the NYNEX Defendants (NYNEX, MECo and NYT) were operating as part of a "unified corporate structure", and thus were not separate "persons" engaged in an illegal "enterprise" in violation of RICO. (18a-19a). The Second Circuit also held that this principle applies to employees and agents of the NYNEX Defendants, such as Cross-Respondent O'Reilly. *Id.*

In its Conditional Cross-Petition, Discon contends that the Second Circuit's decision conflicts with the decisions of other circuits. However, it is clear that any tension among the Circuits on this question is ultimately irrelevant to the dismissal of Discon's claims against Defendant O'Reilly. Discon's Conditional Cross-Petition should be denied accordingly.

There is no dispute among the circuits regarding the basic requirement that RICO "persons" be distinct from the RICO "enterprise". Where the circuits might differ is in deciding what

level of distinctiveness is sufficient to satisfy this requirement. As indicated above, the Second Circuit has held that RICO Plaintiffs cannot avoid the distinctness requirement merely by alleging that a corporation, its officers and agents engaged in a RICO "enterprise" simply by virtue of performing the corporation's regular functions. This reasoning was also utilized by the Sixth Circuit in *Davis v. Mutual Life Ins. Co. of New York*, 6 F.3d 367 (6th Cir. 1993). The *Davis* court stated the general proposition as follows:

> A corporation cannot be both the "enterprise" and the "person" conducting or participating in the affairs of that enterprise . . . Under the "non-identity" or "distinctness" requirement, a corporation may not be liable under section 1962(c) for participating in the affairs of an enterprise that consists only of its own subdivisions, agents or members. An organization cannot join with its own members to undertake regular corporate activity and thereby become an enterprise distinct from itself.

Id., 6 F.3d at 377. The *Davis* court then applied this principle to affirm a jury verdict against an insurance company under RICO for participating in a scheme perpetrated by a group of its agents. In so holding, the *Davis* court stated that:

> It matters not that [the insurance company] acted through an individual whose distinctness from the enterprise is open to question; what matters is that [the insurance company] itself and the enterprise are distinct.

Id., 6 F.3d at 378.

Discon takes issue with the Second Circuit's application of the "distinctness" requirement to dismiss Discon's RICO claims against the NYNEX Defendants, O'Reilly and Eckenrode. Specifically, Discon contends that the lower courts in this case incorrectly held that Cross-Respondent O'Reilly and the NYNEX Defendants were "guided by a single corporate consciousness" and thus not subject to RICO liability as separate "persons" engaged in an "enterprise". *See* Conditional Cross-Petition at 6. Discon then claims that this holding places the Second Circuit opinion in direct conflict with the decisions of nine other Circuit Courts of Appeals. *Id.* Discon is incorrect in three critical respects. These flaws in Discon's position require that its Conditional Cross-Petition be denied, at least as to Cross-Respondent O'Reilly.

First, Discon mischaracterizes the Second Circuit opinion regarding Cross-Respondent O'Reilly. *See* Conditional Cross-Petition at 6-7. The Second Circuit expressly noted in its opinion that Discon "redefine[d] the enterprise as the 'NYNEX Group' " for purposes of its § 1962(c) claim. (*See* 16a-17a). The "NYNEX Group", as defined below by Discon, consists only of the three corporations (NYNEX, MECo and NYT). (*See* 16a-17a).[6] Accordingly, it was *not* Cross-Respondent O'Reilly who was said by Discon before the Second Circuit to be part of the § 1962(c) enterprise. (*See* 17a- 18a). Consistent with Discon's position, the Second Circuit explicitly held that it was the *three NYNEX companies* that were acting within a unified corporate structure and consciousness. Accordingly, if the Second Circuit ruling on the issue of a single corporate structure and consciousness were held incorrect, the matter would be subject to remand for trial as to the NYNEX Defendants, but not as to the Cross-Respondent O'Reilly, since on appeal Discon did not contend that O'Reilly was part of the NYNEX Group.

6. The "NYNEX Group", as defined by Discon, consists only of the three corporations (NYNEX, MECo and NYT). (*See* 16a to 17a).

Discon's Conditional Cross-Petition never squarely addresses the Second Circuit's holding that agents and employees, such as Cross-Respondent O'Reilly, are not subject to RICO liability under the *Riverwoods Chappaqua* decision, *supra*. Specifically, the Second Circuit opinion states that:

> *Riverwoods* expressly applies to "agents" as well as "employees" so long as those persons act on behalf of the corporation. Although the situation might be different if the defendants were acting outside the scope of their agency, this situation is not presented here.

(18a-19a). No argument has been presented here as to why Cross-Respondent O'Reilly should be subject to liability under § 1962(c), since he was employed by MECo, and was acting within the scope of his employment during the time period in question. This result is further supported by the decision of Fifth Circuit in *Old Time Enterprises, Inc. v. International Coffee Corporation*, 862 F.2d 1212 (5th Cir. 1989). In *Old Time Enterprises*, the court held that, when an alleged RICO violator is a legal entity, the required distinctness:

> . . . is not established merely by showing that the corporation, through its employees, officers and/or directors, committed a pattern of predicate acts in the conduct of its own business.

Old Time Enterprises, 862 F.2d at 1217. Accordingly, since it was not seriously challenged on appeal that O'Reilly was, at most, an employee of MECo acting within the scope of his authority in facilitating the alleged "enterprise," no genuinely certifiable is presented as to his non-liability under § 1962(c).

Discon also overstates the variances among the Circuits. Based on its mischaracterizations of the Second Circuit opinion, Discon contends there is a conflict between the Second Circuit and nine other Circuit Courts of Appeals, making certiorari appropriate to resolve the conflict. However, there is not a significant conflict between the Second Circuit's holding in this case, at least as it concerns Cross-Respondent O'Reilly, and the decisions cited by Discon. Since Discon's Cross-Petition does not present a significant issue for resolution as to Cross-Respondent O'Reilly, this Court should deny Discon's Conditional Cross-Petition as to Mr. O'Reilly.

Discon argues that the Second Circuit opinion is in irreconcilable conflict with decisions of the First, Third, Fifth, Sixth, Seventh, Eighth, Ninth and District of Columbia Circuits. *See* Conditional Cross-Petition at 6-7 n.2. However, the conflicts Discon alleges, to be extent that they exist, do not affect the propriety of dismissing Discon RICO claims against Cross-Respondent O'Reilly.

As is predictably the case when dealing with matters as fact-sensitive as RICO claims, the opinions Discon cites were decided under widely varying circumstances. None of them should be applied to hold individuals such as Cross-Respondent O'Reilly liable for acts performed solely as the agent of their employer in furtherance of corporate business.

Many of the cases Discon cites in support of its position involve alleged RICO enterprises comprised of partners, owners, sole proprietors or corporate officers allegedly using corporate entities to illegal ends.[7] That is clearly not the case in this matter,

7. *See United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983) (affirming RICO conviction of general partner in limited partnership used to facilitate drug smuggling operation); *Fleischhauer v. Feltner*, 879 F. 2d 1290 (6th Cir.

(Cont'd)

in which Cross-Respondent O'Reilly was a mere employee of MECo, one of the three corporations allegedly comprising an illegal RICO enterprise. There is no allegation that O'Reilly acted as anything other than an employee of MECo in his dealings with Discon.[8] Since there is no proof that Cross-Respondent O'Reilly had any role in directing the illegal "enterprise" which allegedly aggrieved Discon, he cannot be held liable under § 1962(c). Therefore, dismissal of the RICO claims against Cross-Respondent O'Reilly was entirely proper under this Court's holding in *Reves v. Ernst & Young*, 507 U.S. 170 (1993) (holding that a person must have some part in directing the affairs of the alleged enterprise in order to be held liable under § 1962(c)).

(Cont'd)
1989) (holding that a defendant could engage in a RICO "enterprise" with his wholly-owned corporation); *United States v. Robinson*, 8 F.3d 398 (7th Cir. 1993) (affirming conviction of Defendant who engaged in enterprise to defraud franchisor and others through a corporation he controlled); *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271 (7th Cir. 1989) (holding that principal of oil distributor could engage in RICO enterprise with corporation they controlled); *McCullough v. Suter*, 757 F.2d 142 (7th Cir. 1985) (affirming conviction of sole proprietor who used his business in conjunction with an illegal RICO enterprise); *Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982) (holding that the founder of a not-for-profit corporation could form a RICO enterprise with the corporation); *United States v. Feldman*, 853 F.2d 648 (9th Cir. 1988) rejecting Defendants argument that he could not participate in a RICO enterprise with corporations he formed since they were allegedly "mere extensions of the Defendant); *United States v. Benny*, 786 F.2d 1410 (9th Cir. 1986) (affirming sole proprietors condition for defrauding institutional lenders through his businesses).

8. It is worth noting that Discon's claims are premised on antitrust law as well as RICO. The federal courts have held that the type of intracorporate conspiracy Discon complains of is generally not actionable in antitrust cases. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1982). *Cf. Haraco Inc. v. American Nat. Bank & Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985).

The remaining cases Discon cites as purportedly conflicting with the Second Circuit ruling in this case are also clearly distinguishable. For instance, in *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529 (9th Cir. 1992), the Ninth Circuit restated the basic distinctness requirement of § 1962(c). *See Id.*, 978 F.2d at 1533-34. Then, following the reasoning of *Benny, supra*, the *Sever* court held that, while a corporation can only operate through its officers and agents, the distinctness requirement of § 1962(c) generally does not defeat claims against corporate employees, *provided* that the corporation is not also named as a defendant. In addition, Discon relies on several other cases in which courts have, after restating the basic distinctness requirement, either dismissed the RICO charges as unsustainable[9], or upheld jury verdicts entered against RICO Defendants based on evidence adduced at trial.[10]

The *Sever* court also held stated that, when the corporation is also a Defendant, the corporation serves as both "the 'person' and the 'enterprise' " for purposes of § 1962(c). *Id.* at 1534. This principle also governed the Third Circuit's decision in *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., Inc.*, 46 F.3d 258, 269 (3rd Cir. 1995), which Discon also cites. Since the Plaintiff in *Sever* named as Defendants several individual officers of a corporation as "persons" for RICO purposes, and named the *corporation* as the enterprise, the distinctness requirement

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9. *See Miranda v. Ponce Federal Bank*, 948 F.2d 41 (1st Cir. 1991) (affirming dismissal of RICO claims against bank officers).

10. *See Davis v. Mutual Life Ins. Co. of New York, supra*, 6 F.3d 367, 377 (6th Cir. 1993) (affirming civil RICO verdict where record was "replete with evidence from which the jury could reasonably conclude" that § 1962(c) distinctness requirement was met). *See also United States v. Horak*, 833 F.2d 1235 (7th Cir. 1987) (affirming criminal RICO conviction where "the evidence manifestly permitted a jury to conclude beyond a reasonable doubt" that the Defendant was liable under RICO).

was satisfied. *Sever*, at 1534. However, the distinctness requirement is *not* satisfied in this case, since both MECo *and* O'Reilly are named as Defendants.

For the reasons indicated above, there is not a significant conflict between the Second Circuit holding in this case, as it concerns Cross-Respondent O'Reilly, and the decisions of other circuits. This Court should deny Discon's Conditional Cross-Petition as to Mr. O'Reilly accordingly.

III.

GRANTING THE CONDITIONAL CROSS-PETITION IS NOT NECESSARY TO CORRECT AN INJUSTICE, SINCE THE SECOND CIRCUIT OPINION IS IN ACCORD WITH SUPREME COURT PRECEDENT AND THE WEIGHT OF AUTHORITY ON THE RICO ISSUES.

The Second Circuit's decision was in accord with this Court's decision in *Reves*, *supra*. As the Court is aware, *Reves* requires a RICO Plaintiff to show that a defendant "person" exercised some degree of management or control over the alleged illegal enterprise in order for liability to attach under § 1962(c). *Reves*, 507 U.S. at 184. In this case, Discon alleges that O'Reilly at most acted to further the improper activities of his employer, MECo. *See* Conditional Cross-Petition at 4. There is no specific allegation that Cross-Respondent O'Reilly in any way exercised the necessary management or control over the alleged "enterprise" in this case.

Based on the foregoing, it is clear that this Court need not review the Second Circuit's ruling in this case in order to prevent an injustice. The Second Circuit applied settled principles in dismissing Discon's RICO claims against Cross-Respondent O'Reilly, and there is no substantial conflict between that

dismissal and the prevailing law in other circuits. Furthermore, Discon is unable to demonstrate that Cross-Respondent O'Reilly exercised any significant level of management and/or control over the "enterprise" which allegedly aggrieved Discon. For these reasons, this Court should deny Discon's Conditional Cross-Petition as to Cross-Respondent O'Reilly.

IV.

THIS COURT SHOULD DENY DISCON'S CONDITIONAL CROSS-PETITION, SINCE DISCON FAILED TO ALLEGE THAT ANY PREDICATE ACTS OF DEFENDANTS CAUSED INJURY TO ITS BUSINESS.

Pursuant to § 1964(c), RICO aggrieved parties must demonstrate that they suffered injury to their business or property due to a violation of RICO. The statute also requires that the injury be the direct and proximate result of the alleged violation. *Holmes v. SIPC*, 503 U.S. 258, 265-70 (1992).

Discon alleges that the alleged wrongful acts of the Defendants harmed them as a telephone ratepayer. The District Court properly dismissed these claims as insufficient, since the rates Discon paid were subject to federal and state regulations. (46a). Discon also alleged predicate acts of obstruction of justice and extortion. (44a-46a). However, Discon failed to sufficiently allege that these alleged predicate acts were the proximate cause of any injuries. Accordingly, the courts below properly decided the matter by dismissing Discon's RICO claims with prejudice.

V.

THIS COURT SHOULD DENY DISCON'S CONDITIONAL CROSS-PETITION, SINCE REVIEW OF THIS CASE WOULD REQUIRE THE COURT TO RESOLVE COMPLEX ISSUES OF LAW UNDER UNCERTAIN OR SPECULATIVE FACTS.

The Second Circuit's decision in this matter was based principally on the partys' pleadings. Because a complete factual record may reveal unsuspected issues, as well as foreclosing or realigning issues presented based on the facts as they are today presumed, this case is not ripe for Supreme Court review.

The fundamental doctrine of ripeness stresses that cases are not within the Court's jurisdiction unless there are present the "sort of proved or admitted facts that would enable [the Court] to adjudicate [the] claim" presented "in clean cut and concrete form." *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 587-588 (1972) (pointing to "extraordinarily skimpy" factual record and "singularly sparse" factual allegations as factors which render a case unripe for judicial review) *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986) (holding that a case must be vacated and remanded for supplementation of the factual records where the facts necessary to a proper determination were not available).

CONCLUSION

For all the foregoing reasons, Cross-Respondent Bernard O'Reilly respectfully urges this Court to deny the Conditional Cross-Petition of Discon, in accordance with the cited authorities.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DISCON INCORPORATED,

Cross-Petitioner,

vs.

NYNEX CORPORATION, NYNEX MATERIEL ENTERPRISES COMPANY, NEW YORK TELEPHONE COMPANY, ROBERT J. ECKENRODE, and BERNARD O'REILLY,

Cross-Respondents.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CROSS-PETITIONER'S REPLY BRIEF

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No. 96-1785

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DISCON INCORPORATED,

Cross-Petitioner,

VS.

NYNEX CORPORATION, NYNEX MATERIEL ENTERPRISES COMPANY, NEW YORK TELEPHONE COMPANY, ROBERT J. ECKENRODE, and BERNARD O'REILLY,

Cross-Respondents.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CROSS-PETITIONER'S REPLY BRIEF

1. Cross-Respondents Have Failed To Rebut Discon's Showing that the Decision of the Court Below Conflicts with the Decisional Law of Nine Other Circuits

Discon's Conditional Cross-Petition ("Cross-Pet.") showed (at 6-9. n 2), that under the clear decisional law of nine Circuit Courts of Appeal, in conflict with the decision of the court below, the individual cross-respondents, Robert J. Eckenrode, an officer of cross-respondent NYNEX Corp., and Bernard O'Reilly, a district manager of cross-respondent MECo, would be held to be distinct from the "enterprise" defined in Discon's Amended Complaint and, accordingly, that they would be subject to liability in those nine Circuits.

The Brief in Opposition ("Br. Opp.") of cross-respondents NYNEX Corp. MECo, NYTel and Eckenrode ("NYNEX") discusses only one of the sixteen cases that Discon cited in this connection, and even as to this one case, *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258 (3d Cir. 1995), NYNEX does not claim that it does not conflict with the decision of the court below but rather that it was wrongly decided. *See*, Br. Opp. 8 n 6.[1]

Instead, NYNEX asserts that "in actuality, the holding of the court below is consistent with the weight of authority in the Circuits that have addressed this issue" (Br. Opp. 7). However, in seven of the ten cases that NYNEX cites as direct support for this assertion (Br. Opp. 7-8, n 4), there were no individual defendants at all.[2]

Of the three remaining cases cited by NYNEX, one explicitly states that "the defect in proving the existence of

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[1] NYNEX string cites several of the cases cited by Discon, but only for the undisputed proposition that the "person" alleged to be liable for conducting the affairs of an enterprise through a pattern of racketeering activity must be distinct from that enterprise. *See*, Br. Opp. 6.

[2] *See*, *Compagnie de Reassurance d'Ile de France* v. *New England Reinsurance Corp.*, 57 F.3d 56 (1st Cir.), *cert. denied*, 116 S. Ct. 564 (1995); *NCNB Nat'l Bank* v. *Tiller*, 814 F.2d 931 (4th Cir. 1987); *United States* v. *Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983); *Parker & Parsley Petroleum Co.* v. *Dresser Indus.*, 972 F.2d 580 (5th Cir. 1992); *Atkinson* v. *Anadarko Bank & Trust Co.*, 808 F.2d 438 (5th Cir.) (*per curiam*), *cert. denied*, 483 U.S. 1032 (1987); *Puckett* v. *Tennessee Eastman Co.*, 889 F.2d 1481 (6th Cir. 1989); *Richmond* v. *Nationwide Cassel L.P.*, 52 F.3d 640 (7th Cir. 1995).

a 'person' separate from the 'enterprise' is *not* present with respect to [the individual defendant]," *Board of County Comm'rs of San Juan County* v. *Liberty Group*, 965 F.2d 879, 886 (10th Cir.), *cert. denied*, 506 U.S. 918 (1992) (emphasis supplied); one upheld the dismissal of a § 1962(c) claim against the individual defendants solely because those very defendants were also individually named as part of the "enterprise" alleged, *see*, *Odishelidze* v. *Aetna Life and Casualty Co.*, 853 F.2d 21 (1st Cir. 1988); and the third affirmed the dismissal of the complaint, but with leave to replead, because the court found it impossible to ascertain what the alleged "enterprises" comprised, *see*, *Old Time Enterprises, Inc.* v. *International Coffee Corp.*, 862 F.2d 1213, 1217 (5th Cir. 1989).

The lesson of the cases cited by NYNEX is that a separate RICO "enterprise" is not demonstrated merely by showing that a corporate defendant (or other entity) committed a pattern of predicate acts in the conduct of its own business. *See*, *Board of County Comm'rs of San Juan County* v. *Liberty Group*, 965 F.2d, *supra*, at 885; *Old Time Enterprises, Inc.* v. *International Coffee Corp.*, 862 F.2d, *supra*, at 1217; *Parker & Parsley Petroleum Co.* v. *Dresser Indus.*, 972 F.2d, *supra*, at 583; *Puckett* v. *Tennessee Eastman Co.*, 889 F.2d, *supra*, at 1489. Accordingly, a defendant corporation would not be distinct from an "enterprise" defined solely as that corporation and a number of its employees. The converse, however, is not true. As the cases cited in the Cross-Petition show, individual defendants are routinely held to be distinct from an "enterprise" defined as the company that employs them because, in such cases, the defendants are charged with operating not their own, but the company's, affairs through a pattern of racketeering activity. Thus, the cases cited by NYNEX do not support the decision of the court below. Nor

does any of those cases contradict the holdings of the cases cited by Discon under which the individual cross-respondents, Eckenrode and O'Reilly, would be held distinct from the "enterprise" defined in Discon's amended complaint.

In a separate Brief in Opposition, Cross-Respondent O'Reilly claims that as a person acting within the scope of his employment, as a "mere employee" of cross-respondent MECo, he should not be subjected to liability under § 1962(c) because, he asserts, in *Reves* v. *Ernst & Young*, 507 U.S. 170 (1993), this Court limited the reach of such liability to persons having "some part in directing the affairs of the alleged enterprise" (O'Reilly Br. Opp. 15). Cross-respondent O'Reilly, however, was alleged to have been a district manager of MECo (Joint Appendix ("J.A.") 116), and this Court stated in *Reves* that an enterprise is "'operated' not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management," *Reves*, at 184 (footnote omitted). In any event, the question of whether, as O'Reilly claims, he acted solely within the scope of his employment in his dealings with Discon is, of course, a matter for proof at trial.

(Cross-respondent O'Reilly also argues that he is not a proper party respondent. While acknowledging that "[u]nder Rule 12.5" he was "fairly put to the jeopardy" of being named as a respondent to a Conditional Cross-Petition, he argues that he escaped that jeopardy because Discon was "plainly noticed that O'Reilly was neither a Petitioner nor a remaining interested party in accordance with Rule 12.6" [O'Reilly Br. Opp. 9]. However, O'Reilly acknowledges that the first such notice was contained in the NYNEX petitioners' opening brief. *Id.* By the time that that brief was

served on Discon, Discon's time to file an opening petition against O'Reilly had, of course, elapsed. Thus, the logical and practical conclusion of O'Reilly's argument is that a party, like Discon, that does not intend to seek review of the decision of the Court of Appeals unless the other side seeks such review, would have to file an opening petition defensively against all parties on the other side, in order to guard against the possibility that some, but not all, of those parties will seek review by this Court. This conclusion would render the provision for filing conditional cross-petitions pursuant to Rule 12.5 nugatory in cases with multiple parties.)

The Cross-Petition also showed that the holding of the court below that cross-respondents NYTel and MECo are not distinct from the "enterprise" defined in the amended complaint conflicts with the holding of the Seventh Circuit that a subsidiary is distinct from its parent corporation, *see, Haroco, Inc.* v. *American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984), *aff'd per curiam*, 473 U.S. 606 (1985), and is at odds with the reasoning of the Seventh Circuit, adopted in *haec verba* by the Courts of Appeal for the Third and Ninth Circuits, *viz.*, that "the only important thing" is that the enterprise be either formally or practically separable from the defendant. *McCullough* v. *Suter*, 757 F.2d 142, 144 (7th Cir. 1985). *See*, Cross-Pet, 8-9.

Again, none of the cases cited by NYNEX weighs against this showing. Only four of those cases involved a subsidiary and its parent or affiliate. Of those, one, *United States* v. *Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983), held that an *unincorporated* division of a corporation is not distinct from that corporation; one, *Compagnie de Reassurance d'Ile de*

France v. *New England Reinsurance Corp.*, 57 F.3d 56 (1st Cir.), *cert. denied*, 116 S.Ct. 564 (1995), held that an entity that was initially an unincorporated division and then became a separately incorporated subsidiary of a corporation was not distinct from that corporation where all of the subsidiary's employees were, in fact, employees of the parent corporation and where there was "no evidence whatsoever [that the subsidiary] took any actions independent of its parent," 57 F.3d at 92; one, *Atkinson* v. *Anadarko Bank & Trust Co.*, 808 F.2d 438 (5th Cir.) (*per curiam*), *cert. denied*, 483 U.S. 1032 (1987), merely held that there was no evidence of any activity on the part of the alleged enterprise other than the activity of the named defendant and, accordingly, that there was no association in fact. Here, of course, cross-respondents NYTel and MECo are both legally and practically distinct from the "enterprise" alleged, and, as shown in the Cross-Petition, it was precisely the separate legal existence of NYTel as a regulated company with captive customers that was the linchpin of the activities complained of.

Only one case cited by NYNEX is even arguably consistent with the decision of the court below on this point. In *NCNB Nat'l Bank* v. *Tiller*, 814 F.2d, *supra*, the Fourth circuit held, on the basis of its earlier holding in *United States* v. *Computer Sciences Corp.*, 689 F.2d, *supra*, that a bank was not distinct from its parent holding company. But the existence of one case that is arguably consistent with the decision of the court below hardly diminishes the conflict shown between the decision of the court below as to the corporate cross-respondents and the decisional law of, at least, the Third, Seventh and Ninth Circuits.

NYNEX's final argument on this question, *viz.*, that

if Discon's view prevails "then all a plaintiff would need to do in order to circumvent the distinctiveness requirement...in any claim against a corporation would be to name as a defendant at least one employee or subsidiary of defendant corporation" (Br. Opp. 9), simply makes no sense. The addition of defendants can have no bearing on whether a particular defendant corporation (or individual) is distinct from the "enterprise" that is alleged, because whether a defendant is distinct from the "enterprise" must be determined for each defendant separately. *See, e.g., Schreiber Distributing Co.* v. *Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1398 (9th Cir. 1986) (error to dismiss as to two individual defendants because other defendants not distinct from "enterprise"). For this reason, cross-respondent O'Reilly's apparent argument that *he* is not distinct from the "enterprise" because co-respondent MECo was both named as a defendant and included as an element of the association in fact "enterprise" must also fail (O'Reilly Br. Opp. 17).[3]

2. The Alternative Theories Argued by Cross-Respondent, which Were Not Decided by the Court of Appeals, Cannot Support the Judgment Below.

NYNEX argues that the judgment below can be supported by the holdings of the District Court that Discon

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[3] What cross-respondent O'Reilly states, however, is that he is not distinct from the "enterprise" alleged because both he and MECo are defendants.

O'Reilly does not claim, as indeed he cannot, that he was individually named as an element of the "enterprise." The phrase, "attorneys, accountants and other agents whom NYNEX has engaged," (J.A. 152 ¶ 115) plainly does not include the corporate defendants' employees.

failed to allege either predicate acts or injury to its business as a result of such predicate acts (Br. Opp. 9-12). Because those holdings are plainly wrong, NYNEX's argument must fail.

A. Discon Sufficiently Alleged Predicate Acts.

The District Court held that Discon's allegations of mail and wire fraud failed to meet the particularity requirements of Fed. R. Civ. Pro. 9 (Pet. 40a-42a).[4] However, with regard to each allegation of mail or wire fraud, the Amended Complaint and the RICO Case Statement specified from whom and to whom each communication was alleged to have been mailed or wired, the date, or the approximate date of such mailing or wiring, the content of the communication, which of the communications were alleged to be deceptive, what the deception was, and the role that the deceptive communication played in the scheme by which Discon was injured. *See*, J.A. 134-139, ¶ 73; 153, ¶ 124.[5]

The District Court also held that all but one of Discon's allegations of extortion were time barred because they were alleged to have occurred more than four years before Discon filed suit (Pet. 44a-45a). However, the four

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[4] References denoted "Pet. -a" are to the Appendix bound with NYNEX's opening Petition.

[5] NYNEX's suggestion (Br. Opp. 4, n 2; 10, n 9) that Discon's allegations of fraud are somehow weakened by Discon's "admi[ssion]" that NYTel got caught by both the FCC and the New York Public Service Commission and was required by both to make at least partial restitution to the ratepayers whom NYNEX had defrauded is both irrelevant here, because it pertains to the merits, and odd, to say the least.

year statute of limitations governing RICO actions requires that suit be brought within four years after the injury for which recovery is sought is discovered or discoverable, not within four years of the earliest predicate act. *Bingham* v. *Zolt*, 66 F.3d 553 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 1418 (1996). Indeed, the RICO Act provides that a RICO claim must be predicated on "at least two acts of racketeering activity, [...] the last of which occurred within ten years [...] after the commission of a prior act of racketeering." 18 U.S.C. § 1961(5). Thus, even if the injury for which recovery is sought is discovered on the day that the last predicate act is committed, the preceding predicate act need only have occurred within the last ten years. Each act of extortion that Discon alleged was alleged to have occurred no more than six and a half years prior to the filing of the complaint. *See*, J.A. 124, ¶ 38; 125-126, ¶ 44; 127, ¶ 50; 129, ¶ 56; 140, ¶ 75. Thus, none was time barred.

B. Discon Alleged that It Had Been Injured by the Predicate Acts Alleged.

Discon plainly alleged injury to its business as a result of the predicate acts alleged. *See*, *e.g.*, J.A. 124, ¶ 38 (extortionate demand by cross-respondent O'Reilly to put Discon out of business unless Discon agreed not to bill for job changes); J.A. 125-26, ¶ 44 (extortionate threat by cross-respondent O'Reilly to put Discon out of business unless Discon withdrew from bidding on a NYTel job); J.A. 126, ¶ 45 (Discon's withdrawal from bidding resulted in exclusion from all NYTel requests for proposals in the mid-Hudson region); J.A. 127, ¶ 50 (threat by cross-respondent NYTel to report unfavorably on Discon unless Discon agreed to defame a MECo employee; J.A. 153, ¶ 124 (report was basis for dropping Discon from list of approved vendors to MECo or NYTel); J.A. 129, ¶ 56 (extortionate demand by cross-

respondent MECo, refused by Discon, that Discon surrender all physical evidence of MECo's illegal markups as condition of being given work again); J.A. 153, ¶ 124 (fraudulent concealment of Discon's low prices to MECo from Discon's ultimate customer and from N.Y. Public Service Commission prevented Discon from enlarging market share).

CONCLUSION

For the reasons given above and in the Conditional Cross-Petition, the Cross-Petition should be granted if the opening Petition is granted.

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Respectfully submitted,

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